SUPREME COURT, U. S.
JAN 21 1974

In The

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutes Involved	3
Statement of Facts	5
"Get a cop; get a cop. This guy is crazy."	6
Bornholdt's Shooting of Varecha	6
Reasons For Granting The Writ	
Point I — The affirmative defense provision of New York Penal Law, §125.25(3), on its face and as applied in this case, violates petitioner's rights under the due process clause and the fifth amendment.	7
Point II — The curtailment of defense counsel's use of two prior inconsistent statements violated due process of law and crippled the petitioner's right to confront his accusers.	12
Point III — Petitioner was denied due process of law when he was forced into a joint trial with Robert Bornholdt, the only person who could exonerate him.	14
Point IV — The petitioner was denied a fair trial before an impartial panel.	17
Conclusion	19
Court of Appeals Opinion	A-1
Order of Appellate Division	B-1

Table of Cases

	Page
Boulden v. *Holman*, 394 U.S. 478 (1969)	17
Brinegar v. *United States*, 338 U.S. 160 (1949)	8
Byrd v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970)	16
California v. *Green*, 399 U.S. 149 (1970)	14
Chambers v. *Mississippi*, U.S. 93 S.Ct. 1038 (February 21, 1973)	15
Coffin v. *United States*, 156 U.S. 432 (1895)	8
Davis v. *United States*, 160 U.S. 469 (1895)	8, 9
Douglas v. *Alabama*, 380 U.S. 415 (1965)	13
Griffin v. *California*, 380 U.S. 609 (1965)	8
Holland v. *United States*, 348 U.S. 121 (1954)	8
Holt v. *United States*, 218 U.S. 245 (1910)	8
In re Winship, 397 U.S. 358 (1970)	8
Jencks v. *United States*, 353 U.S. 657 (1957)	12
Leary v. *United States*, 395 U.S. 6 (1969)	8
Leland v. *Oregon*, 343 U.S. 790 (1952)	8
Lilienthal's Tobacco v. *United States*, 97 U.S. 237 (1878)	8
Maxwell v. *Bishop*, 398 U.S. 262 (1970)	17
Michaelson v. *United States*, 266 U.S. 42 (1924)	8
Miles v. *United States*, 103 U.S. 304 (1880)	8
People v. *Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970)	16
People v. *Owens*, 22 N.Y.2d 93, 291 N.Y.S.2d 313 (1968)	16

Page

People v. *Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961) 12

Pointer v. *Texas*, 380 U.S. 400 (1965) 14

Speiser v. *Randall*, 357 U.S. 513 (1958) 8

State v. *Romprey*, 339 S.W.2d 746 (Mo. 1966) 13

Tha-Soo-yel-lee v. *United States*, 167 U.S. 274 (1897) .. 14

Turner v. *Louisiana*, 379 U.S. 466 (1965) 14

United States v. *Echeles*, 352 F.2d 982 (7th Cir. 1965) . 16

United States v. *Gleason*, 259 F. Supp. 282 (S.D.N.Y. 1966) 16

United States v. *Jackson*, 390 U.S. 570 (1968) 9

United States v. *Shuford*, 454 F.2d 772 (4th Cir. 1971) . 16

Wilson v. *United States*, 232 U.S. 563 (1914) 8

Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 17

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The petitioner, Albert Victory, prays that a Writ of Certiorari issue to review the judgment of the New York Court of Appeals entered on October 23, 1973.

Opinion Below

The opinion of the Court of Appeals is not yet reported, but is reprinted in Appendix A to this petition. The Appellate Division wrote no opinion, but the Order of Affirmance is reprinted here as Appendix B.

Jurisdiction

Following a jury trial, on April 17, 1970 the petitioner was found guilty of felony murder in the State Supreme Court, New York County, in violation of New York Penal Law §125.25(3). On May 26, 1970 the petitioner was sentenced to a term of twenty-five years to life imprisonment. Petitioner's conviction was affirmed without opinion by the Appellate Division, First Department, on May 23, 1972 and by the Court of Appeals on October 23, 1973.

This petition is seasonably filed within 90 days of the Court of Appeals order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Whether the affirmative defense provision of the New York Penal Law, §125.25(3), on its face and as applied in this case, violates petitioner's rights under the due process clause and the fifth amendment.

2. Whether the curtailment of defense counsel's use of two prior inconsistent statements violated due process of law and crippled the petitioner's right to confront his accusers.

3. Whether the petitioner was denied due process of law when he was forced into a joint trial with Robert Bornholdt, the only person who could exonerate him.

4. Whether the petitioner was denied a fair trial before an impartial panel.

Constitutional Provisions Involved

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutes Involved

Penal Law, §125.25 Murder

"A person is guilty of murder when:

* * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person

other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder is a class A felony."

Penal Law, §120.05 Assault in the Second Degree

"A person is guilty of assault in the second degree when:

* * *

3. With intent to prevent a peace officer or a fireman from performing a lawful duty, he causes physical injury to such peace officer or fireman; or * * *"

Penal Law, §205.10 Escape in the Second Degree

"A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a class E felony."

Statement of Facts

On October 6, 1968 a New York police officer stopped petitioner outside Arthur's Discotheque for driving through a red light (684, 836, 1034, 1224).[1] Although witnesses to the events that followed gave varying descriptions of what happened between petitioner and the patrolman, John Varecha, one witness said Varecha pulled petitioner to the sidewalk from Arthur's stairs (1467-1468). Varecha then walked toward petitioner's car, threatening to have it towed away (1036).[2] Petitioner, following Varecha, begged the officer to "give me a break" (1037).

Some pushing and shoving occurred as they moved along the sidewalk (1038). The other defendant, Robert Bornholdt, who was a passenger in petitioner's car, followed petitioner and Varecha along the sidewalk (1041). Petitioner told Bornholdt to stay out of the matter saying, "I'll take care of this" (1042, 1232, 1337).

The People's chief witness, Francisco Garcia, a bystander, testified under questionable circumstances that petitioner kneed Varecha in the groin (1042). Bornholdt, "pouncing" on Varecha, was smashed on the head by the officer's billy club (1046, 1297). Petitioner was clubbed several times and pushed onto a parked automobile (964, 1047). Petitioner bled profusely after being clubbed (1049, 1051, 1235).

Varecha, holding his groin, drew his revolver with his other hand, arrested petitioner and Bornholdt, and told them to stand against an alley wall (1052). Petitioner holding his head complied (1052, 1237).

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[1]Refers to pages of the printed Record on Appeal in the New York Court of Appeals.

[2]Petitioner had initially denied ownership of the car.

"Get a cop; get a cop. This guy is crazy."

Petitioner, calling for assistance, said to Garcia, "Get a cop; get a cop. This guy [Varecha] is crazy" (1195, 1242, 1244). Bornholdt continuously moved behind Varecha. Petitioner continued to plead with Varecha to " . . . give me a break, I wasn't doing anything" (1052).

Varecha then ordered petitioner to move over to the other side of the alley, and he obeyed (1241). Petitioner stood next to the wall, with his hands raised, but Bornholdt continued to move behind Varecha. Garcia saw Bornholdt "grabbing" for something in his clothing (1058, 1249-1250).

Bornholdt's Shooting of Varecha

Garcia went out to the sidewalk and yelled to his wife to "get help" (1058). He heard a shot and fell to the ground (1059, 1252). Garcia immediately got up and began to run toward Arthur's. Hearing a second "soft" shot, he returned to the alley (1254). Just as he approached the alley, he heard a series of rapid-fire shots. Garcia saw the flash from the last shot fired by Bornholdt, who was standing over Varecha gun in hand (1060-1061).

After Bornholdt bolted out of the alley, petitioner crept out slowly, with his back and hands against the wall (1527, 1585). Petitioner ran down the street, but was stopped by an off-duty police officer (1529). Bornholdt was captured by an off-duty Housing Authority police officer (1662). When returned to the alley, petitioner repeatedly protested his innocence, saying, "Didn't I tell you to call the cops. What did I do? I didn't do nothing" (879, 1065, 1350, 1483, 1485).

Petitioner and Bornholdt were then indicted and tried for felony murder. Bornholdt was also charged with common law murder for his shooting of Varecha. The prosecution's theory was that petitioner and Bornholdt were arrested after feloniously assaulting Varecha, causing serious physical injury,

and then attempted to escape from custody. During the alleged attempt to escape, Bornholdt shot Varecha.

The jury deliberated for two days and finally found petitioner guilty of felony murder. In light of the life sentence imposed upon petitioner for this abortive felony murder conviction, we turn immediately to the substantial reasons why the writ should be granted.

REASONS FOR GRANTING THE WRIT

POINT I

The affirmative defense provision of New York Penal Law, §125.25(3), on its face and as applied in this case, violates petitioner's rights under the due process clause and the fifth amendment.

The affirmative defense included in §125.25(3), requiring that a defendant prove he did not aid in the commission of another's homicide and that he had no reasonable grounds to believe another intended a homicide, is incompatible with an accused's constitutional privilege against self-incrimination.[3] The magnitude of this issue must be measured against the historic protection always afforded a man's privilege to remain silent.

In an unbroken series of cases extending over a long stretch of this Court's history it has been held postulate that in a criminal prosecution the defendant is entitled to the protection of the presumption of innocence, and his guilt must be established

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[3]Section 125.25(3) provides in relevant part that a defendant must prove that he:

> (a) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) was not armed with a deadly weapon, . . . ; and
>
> (c) had no reasonable ground to believe that any other participant was armed with such a weapon, . . . ; and
>
> (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Defense counsel, completely prevented from discussing the affirmative defense in his summation (2847), excepted to the court's charge on the affirmative defense.

beyond all reasonable doubt.[4] And of course, no unfavorable inference can be drawn from defendant's failure to offer evidence on his own behalf. *Griffin* v. *California*, 380 U.S. 609 (1965). Moreover, New York courts have consistently held that the People must prove the non-shooting defendant acted in concert with the shooting defendant in a felony murder prosecution.

The burden of proof must always remain with the prosecution in respect to each and every element of the crime charged. *Leary* v. *United States*, 395 U.S. 6 (1969); *Leland* v. *Oregon*, 343 U.S. 790 (1952); *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237 (1878). The *Leary* case is fully relevant here because the removal of the People's obligation to prove that petitioner acted in concert had the effect of presuming his guilt on that critical issue. For that matter, requiring the defendant to disprove this element of the offense is far more grievous than the creation of a statutory presumption. In the latter case, once the presumption is rebutted, the prosecution must go forward and establish that fact beyond a reasonable doubt. Whereas here, that critical burden of proof never returns to the People. The defendant must disprove that significant criminal element by a preponderance of the evidence.[5] No such rule pertains in the statutory presumption case.

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[4] *In re Winship*, 397 U.S. 358 (1970); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958); *Holland* v. *United States*, 348 U.S. 121, 138 (1954); *Leland* v. *Oregon*, 343 U.S. 790, 795 (1952); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949); *Michaelson* v. *United States*, 266 U.S. 42 (1924); *Wilson* v. *United States*, 232 U.S. 563, 569-570 (1914); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Coffin* v. *United States*, 156 U.S. 432 (1895); *Miles* v. *United States*, 103 U.S. 304, 312 (1880).

[5] Here, the trial court's charge ensured petitioner's heavy burden:

"Now when the law imposes the obligation of establishing an affirmative defense on a defendant he is required to establish it by a preponderance of

(*Footnote continued on following page.*)

Even in the case where the defendant must raise the defense of insanity, the prosecution must disprove it beyond a reasonable doubt. *Davis* v. *United States*, 160 U.S. 469 (1895). The relocation of the burden of proof on these essential elements of the crime of felony murder is constitutionally impermissible.

By allocating to the defendant the burden of proof on the crucial issues involved in this affirmative defense, the jurors come to expect proof from the accused. Here the petitioner was unable to call his co-defendant, the only person who could exculpate him, and was forced either to take the stand or remain silent and suffer the consequences. Furthermore, these statutory provisions detract from the court's charge on the defendant's privilege to remain silent and penalize a defendant for invoking that constitutional privilege. *See United States* v. *Jackson*, 390 U.S. 570 (1968).

There may be some areas of proof assigned to a defendant in a criminal trial. For affirmative defenses usually are based upon the defendant's exclusive knowledge of certain facts. However, an affirmative defense may not be enlarged to include the main elements of a particular crime. They should be limited to persons excused from criminal liability because of special circumstances. In that situation a defendant need only prove his membership in the class of persons protected by the affirmative defense. Consequently, requiring a defendant to prove his membership in such a protected class is not unreasonable for the

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(*Footnote continued from preceding page.*)

> evidence. He is not required to establish his affirmative defense beyond a reasonable doubt, but only by a preponderance of evidence." (3058)

The court then told the jury that if the evidence were balanced:

> ". . . so evenly that you are unable to say whether there is a preponderance of evidence on either side, then you must resolve the question in favor of the prosecution, and find that the defendant has failed in his burden of establishing his affirmative defense by a fair preponderance of evidence." (3060)

prosecution is still obliged to prove all essential elements of the crime.[6]

Finally, under this case's unique circumstances the error was compounded when the affirmative defense was unconstitutionally applied. Here the Court of Appeals expressly recognized that the elements of the affirmative defense in the New York statute go, "in the final analysis, to the guilt — to the rightness of punishing the accused. It recognizes, in effect, the unjustness of imposing criminal liability for consequences as to which there is no culpable mental disposition on the part of the accomplice defendant." (A-8, *infra.*) The Court concluded: "That being the case, and considering the disparities and convenience of proof and opportunity for knowledge, it seems appropriate to shift the burden of persuasion to the defendant." (A-9, *infra.*)[7]

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[6] As an example, the affirmative defense in New York Penal Law, §235.15 states:

> "In any prosecution for obscenity, it is an affirmative defense that the person to whom allegedly obscene material is disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justifications for possessing or viewing the same."

Thus, persons who belong to scientific, educational, governmental, or other similar classes, and who normally would be charged with promoting obscenity, may avoid the strictures of the penal statute simply by demonstrating their membership in one of the insulated classes.

Other illustrative affirmative defenses may be found in the following New York Penal Law sections:

> Unlawful imprisonment, §135.15, and Kidnapping, §135.30 (defendant may show he is a relative).
>
> Arson, §150.05 (defendant may show he is the sole proprietor of the building).
>
> Falsifying business records, §175.15, and Issuing a bad check, §190.15 (defendant may show he is an employee acting pursuant to his employer's direction).
>
> Endangering welfare of a child, §260.15 (defendant may show he is a parent or guardian and a member of a certain religious organization).

[7] The test of "convenience" is worth examining in this case. For purposes of studying the fairness of shifting the burden of proof, assume these hypothetical facts, which are in no way contradicted by the trial testimony:

(*Footnote continued on following page.*)

Under circumstances such as those in our hypothetical, where is the disparity and convenience of proving petitioner's lack of knowledge that Bornholdt was armed and intended to shoot the police officer? And how can petitioner possibly sustain the burden of proof imposed by the New York statute? There was no evidence whatever that petitioner and Bornholdt had earlier set out together with a planned felony in mind. They were not robbers, burglars, rapists, or escapees from an institution. There was no planned felony in progress which would suggest that petitioner had a way of knowing that Bornholdt was armed and would shoot a police officer. In short, petitioner was clearly denied due process of law when, on the facts here, the criminal process simultaneously compelled him to come forward with the very proof that was otherwise denied to him by the state. For all these reasons, this Court should grant a writ of certiorari.

(*Footnote continued from preceding page.*)

Petitioner attends a party with a friend. At the party he meets for the first time a man named Bornholdt who is there with his friend. They engage in some casual, insignificant conversation. Later, petitioner mentions that he is going to Arthur's Discotheque. This man Bornholdt asks for a ride and petitioner obliges. En route to Arthur's, petitioner commits certain traffic infractions for which he is stopped by a police officer. Petitioner attempts to talk his way out of the traffic summons and, noticing Bornholdt's pique, directs him to stay out of the matter on more than one occasion.

A scuffle ensues. Petitioner and Bornholdt are both arrested at gun point, but Bornholdt refuses to surrender. Instead, Bornholdt suddenly draws an 8-shot semi-automatic pistol and fatally shoots the police officer. Petitioner and Bornholdt are both arrested and tried for felony murder. Despite Bornholdt's statement exonerating him, petitioner is denied a separate trial and cannot call Bornholdt as a witness in a joint trial.

POINT II

The curtailment of defense counsel's use of two prior inconsistent statements violated due process of law and crippled the petitioner's right to confront his accusers.

Another critical issue, involving a violation of the petitioner's rights under the due process and confrontation clauses, is the curtailment of defense counsel's cross-examination of the People's principal witness. On the night of the shooting, Francisco Garcia gave two statements regarding the events he had witnessed.[8] In neither statement did Garcia mention the alleged kneeing of officer Varecha by the petitioner. That kneeing incident was the cornerstone of the whole case which, in its absence, would have come crashing down. Without the kneeing there was no assault, no lawful arrest, no possible escape from custody, and no felony murder. It is that simple. And it is uncontroverted that both statements contained this glaring omission.

Until the Court of Appeals decision here, the law regarding use of prior inconsistent statements for impeachment of witnesses was the same in the federal and New York courts. Thus, in *People* v. *Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), the Court of Appeals implemented this Court's holding in *Jencks* v. *United States*, 353 U.S. 657 (1957). However, the Court of Appeals, apparently straining here to uphold the conviction of a "cop killer," fashioned a new rule which clashes both with fundamental fairness and with the facts of this case. The Court of Appeals held that the omission from not one but two statements given within a few hours of the events of a "fact related at trial" could not be shown to the jury unless defense

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[8]One statement was taken by Detective Byrne and the other, a twelve-page stenographically recorded statement, was taken by an Assistant District Attorney.

counsel first demonstrated that the witness' attention had been directed toward that particular detail at the time he gave the statement. (A-12, *infra*.)

Incredible as it may seem, the Court of Appeals developed this new rule despite the fact that Garcia testified that he thought he had told the detective and prosecutor about the kneeing incident (1188). That testimony can only mean that if the kneeing incident actually happened,[9] Garcia's attention was in fact directed toward that detail at the time of the statements. Therefore, there is no factual basis in this case for the Court of Appeals' application of such a rule. Due process thus requires review by this Court of this improper conviction.[10]

Equally significant is the injustice wrought by this new rule. For the ultimate function of the jury trial was poorly served when the jury heard Garcia recall telling the detective and prosecutor about the kneeing, but were not informed that if he told them, it appeared nowhere in his statements. The better procedure in a case of this sort would be to permit defense counsel to demonstrate the omission and allow the prosecution to show whether the witness' attention had been directed to that fact. The jury could then decide more capably whether the omission was based upon the witness' lack of candor or upon an oversight.

The defendant's unfettered right to cross-examine his accusers is basic to our system of criminal justice. *Douglas* v.

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[9]The medical examiner found no sign of trauma or injury to Varecha's genitals, and there were no bruises on his thighs (1864-1865, 1905).

[10]The cases cited by the Court of Appeals at A-12 were furnished by the District Attorney in an eleventh hour patchwork of a critical point in the appeal. This pitiful attempt to justify the trial court's ruling was made by the People for the first time in the Court of Appeals. Those decisions, however, either predate *Rosario* and *Jencks*, or are civil cases involving none of the constitutional concerns inherent in this criminal proceeding. Moreover, in *State* v. *Romprey*, 339 S.W.2d 746 (Mo. 1966), the court approved the very procedures sought below by defense counsel.

Alabama, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Tha-Soo-yel-lee* v. *United States*, 167 U.S. 274 (1897). And in *California* v. *Green*, 399 U.S. 149 (1970), this Court approved the receipt in evidence of a prior inconsistent statement. Therefore, there exists no compelling reason for subverting the constitutional right of confrontation and cross-examination by substituting a rule which clearly deals with a question of fact which, in the final analysis, should be determined by the jury.

The denial of fundamental fairness in restricting defense counsel's use of these vulnerable and inconsistent prior statements requires the granting of a writ of certiorari.

POINT III

Petitioner was denied due process of law when he was forced into a joint trial with Robert Bornholdt, the only person who could exonerate him.

Another question of constitutional dimension which has infected the judgment below involves the trial court's denial of petitioner's motion for a severance.

Pitted against the impossibility of proving his affirmative defense and unable to call as a witness a co-defendant who had confessed his exclusive guilt, petitioner repeatedly moved for a separate trial (23-24, 82 1952-1958).[11] The denial of this severance motion violated petitioner's right to call witnesses on his own behalf guaranteed under the sixth amendment, and denied him due process of law under the fourteenth amendment. Certiorari should, therefore, be granted.

At trial, defense counsel explained that Bornholdt had stated to another attorney at the Bellevue Hospital that petitioner had

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[11]The motion papers are reproduced in the record at pages: 126A-129A, 137A-139A, 141A-145A.

nothing to do with shooting the officer (26-28).[12] The statement read:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [*sic*] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and clubed [*sic*] me and Albert and he was going to shoot us." (130A)

Bornholdt never denied making the statement or its truth, and consistently claimed Victory was innocent. He would have so testified in a separate trial (130A, 1957, 3511).

Bornholdt's attorney indicated that his client would invoke his fifth amendment privilege, and the court ordered petitioner's counsel not to call Bornholdt as a witness (48). However, Bornholdt could have exonerated Victory in a separate trial, for at sentencing he stated:

> "I would like to say Albert Victory never knew I had the gun with me and I was insane at the time." (3511)

The denial of Victory's severance motion, despite his desperate need for Bornholdt's testimony, imposed on Victory a sanction so Draconian as to be constitutionally intolerable. It is shocking that in this modern day an innocent man can be forced to stand trial for his life, unable to call the one person who can establish his innocence.

Only last term, this Court considered the fate of a defendant similarly unable to summon evidence that would demonstrate his innocence. *Chambers* v. *Mississippi*, U.S. , 93 S.Ct.

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[12]The severance motion here was made three weeks before trial because prior to that it appeared that Bornholdt would be unable to proceed to trial (22). As petitioner's lawyer argued, the psychiatric report from the hospital indicating Bornholdt's ability to stand trial was issued only 24 hours before the return date of the severance motion (43).

1038 (February 21, 1973).[13] State evidentiary rules compelled the exclusion of the exculpatory evidence in *Chambers*, while here it was the discretion of the trial court. This serious injustice compelled the Court to write in *Chambers:*

> "But . . . [the] denial or significant diminution [of the right of confrontation and cross-examination] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. *Berger* v. *California*, 393 U.S. 314, 135 (1969).
>
> * * *
>
> "We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." (93 S.Ct. at 1046, 1049)[14]

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[13] In *Chambers* this Court held under the due process clause that exclusion of certain defense evidence was constitutionally intolerable. There the petitioner was prevented from proving to the jury that he had not killed a police officer. A witness named McDonald had previously confessed to the shooting, but subsequently repudiated his confession. Chambers, because of state evidentiary rules, was precluded from adversely cross-examining McDonald about his previous admissions. He was further prevented on hearsay grounds from introducing the testimony of three witnesses to whom McDonald had confessed his guilt.

Here two witnesses testified that petitioner told Bornholdt to stay out of his discussions with Varecha (1042, 1232, 1337). Moreover, part of Garcia's statement to Detective Byrne suggested that Bornholdt had initiated an assault on the officer (1297), and petitioner, who was unarmed, did not shoot Varecha. Finally, Bornholdt's statements, which the jury never heard, showed that shooting Varecha was solely his idea. Thus, the similarity between our case and *Chambers* is remarkable because petitioner knew of other, persuasive evidence which unquestionably would have changed the jury's verdict, but was unable to present it to them. Indeed, our case is even more compelling than *Chambers*, for here the co-defendant's exculpatory statements were never repudiated.

[14] *See United States* v. *Shuford*, 454 F.2d 772 (4th Cir. 1971); *Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965); *United States* v. *Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *People* v. *Owens*, 22 N.Y.2d 93, 291 N.Y.S.2d 313 (1968).

In the state court, in a separate trial, Bornholdt's statement would be admissible even if he invoked his privilege against self-incrimination. *People* v. *Brown*, 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 829 (1970).

The Court of Appeals held here that the trial court did not abuse its discretion in denying petitioner's severance motion because petitioner did not prove: (1) what Bornholdt's testimony would be; (2) "how the purported statement would aid his defense to the felony murder charge;" (3) or that Bornholdt would in fact testify (A-11.)

Clearly Bornholdt would have testified that he alone did the shooting and that petitioner, who did not know Bornholdt was armed, did nothing to aid Bornholdt in the slaying of the officer. That testimony would have sustained petitioner's burden of proving the affirmative defense. Petitioner left no doubt of his intention to call Bornholdt in a separate trial and of what Bornholdt's testimony would be.

Our courts simply cannot continue to turn their backs on these claims made by defendants in good faith. Basic due process must transcend the small economy of jointly trying two defendants. Here, against the weight of petitioners large constitutional argument for a separate trial, the state leans only the minimal cost of trying Bornholdt in a separate proceeding, a precious small argument to assert against a man's liberty. For all these reasons, a writ of certiorari should be granted.

POINT IV

The petitioner was denied a fair trial before an impartial panel.

During the jury's selection process there occurred a violation of this Court's decision in *Witherspoon* v. *State of Illinois*, 391 U.S. 510 (1968). *See Maxwell* v. *Bishop*, 398 U.S. 262 (1970), and *Boulden* v. *Holman*, 394 U.S. 478 (1969). In *Witherspoon* the Court held that the state could not organize a "death-qualified" jury; that is, a jury composed exclusively of jurors who favored the death penalty for murder convictions. The Court, discussing the real possibility that such a jury would be comprised of prosecution-oriented jurors ready to convict the

defendant, found that such a jury did not represent a true cross-section of the community. The Court distinguished between persons who could not, under any circumstances, impose the death penalty, and those who opposed the death penalty but who would follow the trial court's instructions.

Here the *voir dire* resulted in a "death-qualified" trial jury, with all the prejudicial ramifications inherent in such a panel. Throughout the *voir dire* those veniremen who expressed reluctance regarding the death penalty were artfully examined by the court and the prosecutor at the Bench. Defense counsel sought unsuccessfully the right to examine the prospective jurors on this issue (34).[15] The opposition silenced, the prosecuting attorney carefully questioned each of the veniremen in this vein: " . . . the feelings that you have about capital punishment and against capital punishment, do you feel that they would make it impossible for you to vote the verdict of death in any case?" (35). When the venireman responded in the affirmative to this carefully worded question, the prosecutor challenged that venireman for cause. In every instance the challenge was sustained.

The prejudice inherent in obtaining a verdict from a jury thus organized cannot be fully ascertained and that very fact epitomizes the problem. One juror was dismissed even after she had sworn to render a fair and impartial verdict (16). Nonetheless, the prosecutor, putting words into the mouth of the prospective juror, was permitted to rehabilitate his challenge for cause.

On another occasion, where a prospective juror sought to explain himself, the court cut him short and, in dismissing him for his alleged inability to impose a death penalty, listened to the carefully chosen language of the prosecutor and not that of the prospective juror (35).

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[15]We note that counsel was permitted to examine the veniremen with respect to other matters.

Defense counsel recorded his objection to the manner of the questioning of the veniremen, and alerted the court to the constitutional grounds for the objection, citing *Witherspoon* (287-288, 3510). The petitioner was convicted of murder, despite the failure of proof and all the other errors at the trial, by a "death-qualified" jury. Consequently, his conviction should be reviewed by this Court on a writ of certiorari.

Conclusion

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Court of Appeals Opinion

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 50 73

The People &c.,

Respondents,

vs.

Robert Bornholdt and Albert Victory,

Appellants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JASEN, J.:

At about 1:00 A.M. on October 7, 1968, a Cadillac operated by Albert Victory, with Robert Bornholdt as a passenger, sped through a red light on East 54th Street near Fifth Avenue in New York City. Patrolman John Varecha, a 25-year-old uniformed police officer on duty in the area, commandeered a taxicab and pursued the vehicle to Arthur's Discotheque on East 54th Street near Third Avenue. In the course of investigating the incident, an altercation ensued between Varecha, Victory and Bornholdt, during which Bornholdt shot Varecha four times at close range. He died enroute to Bellevue Hospital.

Indicted for intentional murder (Penal Law, § 125.25 [1]) (Bornholdt) and felony murder (Penal Law, § 125.25[3] [causing the death of a person during the commission of escape,

second degree]) (Bornholdt and Victory), defendants were convicted of the crimes charged after a joint trial before a jury. Bornholdt was sentenced to concurrent terms of imprisonment of 25 years to life, and Victory was sentenced to a term of 25 years to life. The Appellate Division unanimously affirmed and the appeals are before us by leave of an Associate Judge of this court. [1]

On Victory's appeal the principal issues are whether guilt was proven beyond a reasonable doubt, whether the affirmative defense in the felony murder statute is constitutional, whether the court properly denied a severance, and whether the court's rulings limiting the use of prior statements on cross-examination were proper.

On Bornholdt's appeal, the principle [*sic*] issues concern his competency at the time of trial, and at the time the crime was committed.

The testimony at trial established that Patrolman Varecha arrived at Arthur's Discotheque as the defendants were about to enter. He asked them who had been driving the Cadillac, which was parked at the curb, and demanded to see a registration and driver's license.[2] The defendants were evasive and uncooperative. They then started up the steps to the Discotheque, but Varecha blocked their entrance with his nightstick. The officer, holding Victory's arm to prevent him from entering the Discotheque, threatened to have the car towed away. Once again he asked who was driving and requested a registration and a driver's license. Victory grabbed Varecha by the lapels of his raincoat and stated, "Don't you touch me", or words to that effect. An altercation ensued, during which Victory kneed the

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[1] Bornholdt also appeals so much of the order of the Appellate Division as affirmed the denial, without a hearing, of his motion for a new trial on the ground of newly discovered evidence.

[2] Victory's driver's license had been revoked three years earlier.

officer in the groin, doubling him over. Victory, now joined by Bornholdt, began punching and kicking the officer. Varecha fought back with his nightstick, striking the defendants about the head. Crouched over in pain, he drew his service revolver and told the defendants they were under arrest. Victory slowly backed up in a westerly direction toward Lexington Avenue, his arms outstretched, imploring the officer to give him a "break". Varecha told him to stop and get against a car in the street, but Victory kept backing up. Bornholdt was to the rear of the officer. Varecha again told the defendants that they were under arrest, and ordered them to get against an alley wall. A citizen came to the aid of the officer and was ordered out of the alley by the defendants. Victory, facing the alley wall with his hands extended, swung around and started fighting with the officer. Bornholdt jumped the officer from behind, drew a .32 caliber pistol, and in the course of the continuing altercation, discharged eight shots, four of which struck the officer, fatally wounding him. Bornholdt ran out of the alley, followed seconds later by Victory, who at first emerged slowly, his back to the westerly wall of the alley, arms extended. After a short chase, both defendants were apprehended by off-duty patrolmen who had been at the Discotheque.

PEOPLE v. *VICTORY*

Turning to defendant's first point, he contends that he was not proven guilty beyond a reasonable doubt. We conclude that there was ample evidence, if believed, to prove all the elements of felony murder.

There was eyewitness testimony from which the jury could reasonably find that Victory kneed the officer in the groin (Assault in the Second Degree, Penal Law, § 120.05[3])[3] and

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3 "*§ 120.05 Assault in the second degree* [as amended L. 1968, c. 37]

A person is guilty of assault in the second degree when:

* * * *

3. With intent to prevent a peace officer or a fireman *** from performing a lawful duty, he causes physical injury to such peace officer or fireman.****"

that Bornholdt joined in the assault; that Varecha drew his service revolver and told the defendants that they were under arrest (Code Crim. Pro., § 177[1])[4]; that both defendants continued to resist the restraint sought to be imposed by the officer and got away (Escape in the Second Degree, Penal Law, § 205.10)[5], and that in the course of and in furtherance of getting away, Bornholdt shot and killed the officer, a criminal act, the responsibility for which, Victory, a participant in the underlying felony, must share. (Murder, Penal Law, § 125.25[3].)[6]

In a related point, Victory challenges the court's supplemental instruction concerning the felony murder charge. He refers to the court's supplemental instruction that "flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether the flight takes place before or after the shooting." The supplemental instruction was given in partial response to the following question asked by the jury foreman:

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4 "*§ 177. In what cases allowed*

A peace officer may, without a warrant, arrest a person,

1. For an offense, committed or attempted in his presence * * * *"

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5 "*§ 205.10 Escape in the second degree*

A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a class E felony."

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6 "*§ 125.25 Murder*

A person is guilty of murder when:

* * * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants * * * *"

> "As a matter of law, does the fact of fight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?"

He argues that the court erroneously conveyed the impression that the jury could convict of felony murder even if it determined that the defendant's intent to escape arose after the shooting.

The governing principle is clear: a person may be convicted of felony murder only if it be proved that he or another participant in one of the enumerated felonies killed "in the attempted execution of the unlawful end." (*People* v. *Wood*, 8 N Y 2d 48, 51; see also *People* v. *Joyner*, 26 N Y 2d 106, 109; Penal Law, § 125.25[3].) The trial justice, obviously cognizant of this principle, repeatedly, both in the main charge and in the supplemental charge, instructed the jury that the shooting must have occurred "during the course of", "in furtherance of" and "while" committing the crime of escape. In sum, the court's charge sufficiently informed the jury that if the defendant did not intend to escape at the time the killing occurred, it could not convict of felony murder.

Defendant next raises a constitutional challenge to the affirmative defense provisions of the felony murder statute. Section 125.25 (subdivision 3) of the Penal Law provides that in a felony murder prosecution in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

> "(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

The burden of proof for affirmative defenses is specified in section 25.00 (subdivision 2):

> "When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

That is to say, the defendant has the burden of going forward with the evidence on the issue as well as the burden of persuasion thereon, but merely by a fair preponderance of the evidence.

Defendant asserts that the statutory affirmative defense violates his constitutional privilege against self-incrimination. Specifically, he contends that the affirmative defense provision impels a defendant to take the witness stand and, in effect, requires him to disprove any connection with the killing. While couched in terms of the Fifth Amendment, defendant's argument is more in the nature of a constitutional due process challenge with Fifth Amendment overtones.

The revised Penal Law worked a significant change in prior law by providing an accomplice of a felon who kills an affirmative defense to a felony murder charge. Under the former Penal Law, none of the above enumerated elements constituted a defense to the crime of felony murder where the defendant had the requisite felonious involvement. (See, e.g., *People* v. *Michalow*, 229 N. Y. 325; *People* v. *Friedman*, 205 N. Y. 161; see also, Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 Syracuse Law Rev. 44) The harshness of the rule in particular cases was apparent, and, hence, the instant provisions were incorporated in the revised Penal Law affording an accomplice of a felon who kills an opportunity to "fight his way out" of a felony murder charge.

The affirmative defense provisions, generally, of the Penal Law altered the common law concept of how such defenses were to be established. Traditionally, the defendant asserting a conventional affirmative defense had the burden of going forward with some evidence making the defense one of the issues in the case. (*People* v. *Utica Daw's Drug Co.*, 16 A D 2d 12, 18; see also, *People* v. *Egnor*, 175 N. Y. 419; *People* v. *Downs*, 123 N. Y. 558.) The burden of persuasion, however, remained upon the People upon the whole case to negative the defense beyond a reasonable doubt. (*People* v. *Sandgren*, 302 N. Y. 331, 334; *People* v. *Utica Daw's Drug Co.*, *supra.*)

We recently had occasion to pass on the constitutionality of the affirmative defense of entrapment (Penal Law, §§ 40.05, 25.00[2]) and upheld it against a due process challenge. (*People* v. *Laietta*, 30 N Y 2d 68.) We conclude that the affirmative defense provisions of the felony murder statute are also sustainable.

Due process imposes no impenetrable barrier to shifting the burden of persuasion to the defendant in a criminal case. Within the bounds of reason and fairness, a defendant may be expected to carry the burden of proving his defensive claim (e.g., *Leland* v. *Oregon*, 343 U. S. 790, 799.) However, no single principle can be articulated to explain when these shifts of burden are constitutionally defensible (for attempts at articulation of a principle, see *Rossi* v. *United States*, 289 U. S. 89, 91-92; *United States* v. *Fleischman*, 339 U. S. 349, 360-363.) Rather, what is involved is a subtle balance which acknowledges first that the prosecution adduce sufficient evidence to support the accusation. Beyond this, a point is perceived where it becomes fair to call upon the defendant to prove his claim of defense, as where there is a "manifest disparity in convenience of proof and opportunity for knowledge." (*Morrison* v. *California*, 291 U. S. 82, 91; see also, *People* v. *Laietta*, *supra*, at p. 75.)

The components of the statutory defense before us are peculiarly within the knowledge of the defendant, and are matters upon which he may be fairly required to adduce supporting evidence. For example, who better than the non-killer defendant knows whether his confederates were armed or intended to engage in conduct dangerous to life, and can adduce evidence thereon. To require the prosecution to disprove these elements beyond reasonable doubt would unduly enlarge the scope of the prosecution's proof and reduce whatever efficacy the felony murder statute has. On the other hand, casting upon the defendant the burden of persuasion by a preponderance of the evidence imposes no undue hardship or oppression. The fact that some pressure may thereby be exerted on the defendant to testify would not itself seem to establish unfairness. (See *Yee Hem* v. *United States*, 268 U. S. 178, 185.)

Unlike the defense of entrapment, which merely interposes a bar to prosecution, a defendant's claim for exoneration under the statutory defense before us goes, in the final analysis, to the guilt — to the rightness of punishing the accused. It recognizes, in effect, the unjustness of imposing criminal liability for consequences as to which there is no culpable mental disposition on the part of the accomplice defendant. (See, B. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N. Y. Law Forum 565, 590; see also, A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], § 201.2, subd. [1], par. [b], Comments at pp. 33-39.) As such, it introduces a heretofore unknown mitigation into the harsh common law doctrine of felony murder. By the same token, the statutory defense is inconsistent with the rationale of the doctrine itself which ascribes malice to the felon who kills in the perpetation of an inherently dangerous felony and holds an accomplice in the underlying act vicariously responsible under common law principles of accessorial and conspiratorial liability. While the basic premises underlying the felony murder doctrine have been seriously questioned (see, e.g., A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], § 201.2,

subd. [1], par. [b], Comments at pp. 33-39, *supra*), the Legislature, as is its wont, has chosen to retain the doctrine's basic underlying principle of constructive malice and accomplice liability. The exception or affirmative defense incorporated in the revised Penal Law was intended to be a narrow one. (R. Denzer and P. McQuillan, Practice Commentary, McKinney's Cons. Laws of N. Y., Book 39, p. 237, under Penal Law, § 125.25.) That being the case, and considering the disparities in convenience of proof and opportunity for knowledge, it seems appropriate to shift the burden of persuasion to the defendant. (Cf., A.L.I. Model Penal Code, Tent. Draft No. 4 [1955], 1.13, Comments at pp. 110-114, esp. at p. 113.)

Nor are the considerations fully applicable here which caused the Court in *Stump* v. *Bennett* (398 F 2d 111 [8th Cir.], cert. den. 393 U. S. 1001) to set aside, on due process grounds, the Iowa statute making alibi an affirmative defense. There the statute created insuperable evidentiary difficulties with respect to the burden of persuasion because the defense and the prosecution's proof turned on a principal issue and the evidence on that issue, namely, the defendant's presence at the time and place of the crime. The Court was of the view that by shifting the burden of proof to a person who claims to have been elsewhere when the crime was committed, an irrational and arbitrary presumption of guilt was created. (398 F 2d 116.) Here, no such difficulties of proof are presented. The prosecution need prove commission of the requisite underlying felony and, in the course thereof, that one of the participants caused the death of another person (other than one of the participants). The responsibility of all participants for the death caused in perpetrating the underlying crime is thereby established under the principles discussed above. The defendant's burden is entirely different. It is incumbent upon him, by way of mitigation, to demonstrate that his culpability is relatively minor and that he should not be held answerable to a felony murder charge. In this regard, it is his burden to persuade the jury that he had "nothing to do with

the killing itself * * * was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life." (R. Denzer and P. McQuillan, McKinney's Cons. Laws of N. Y., Book 39, p. 237, under Penal Law, § 125.25.)

Turning next to the severance issue, on balance, we do not believe the trial court abused its discretion in denying the motion. The relevant facts are these. In a motion returnable on the same date the case was moved for trial and jury selection commenced, Victory moved for a severance. The alleged ground was that he intended to call his co-defendant as a witness to introduce a statement, purportedly made by Bornholdt, exculpating Victory. The statement, which was unsigned, read:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [sic] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and had clubed [sic] me and Albert and he was going to shoot us."

The court denied the motion, noting *inter alia*, that the statement was purely conclusory, and that the motion was untimely.

The governing principles may be quickly set out. A motion for a separate trial is directed to the sound discretion of the trial court, subject to review only for an abuse thereof. (*People* v. *Owens*, 22 N Y 2d 93; see also, *Opper* v. *United States*, 348 U. S. 84, 95; *United States* v. *Echeles*, 352 F 2d 892 [7th Cir.].) Where proof against the defendants is supplied by the same evidence, only the most cogent reasons warrant a severance (*United States* v. *Kahn*, 381 F 2d 824, 839 [7th Cir.], cert. den. 389 U. S. 1015.) But upon a proper showing of need for a co-defendant's testimony, it may be an abuse of discretion to deny severance. (*People* v. *Owens*, *supra*, at p. 98; see, *United States*

v. *Gleason*, 259 F. Supp. 282 [S. D. N. Y.].) However, a proper showing of need imports that the movant clearly show what the co-defendant would testify to and that such testimony would tend to exculpate the movant. (*Byrd* v. *Wainwright*, 428 F 2d 1017, 1020 [5th Cir.].) Moreover, the Court is not required to sever where the possibility of the co-defendant's testifying is merely colorable or speculative. (*Byrd* v. *Wainwright*, *supra*, at p. 1022; *United States* v. *Kahn*, *supra*, at p. 841.) Finally, the motion must be timely. (*People* v. *Owens*, *supra*, at p. 98.)

Applying these guidelines to the instant case, it cannot be said that the court abused its discretion in denying the motion. Victory never offered proof as to what Bornholdt's testimony would be, save for the conclusory statement quoted above. Nor did he show how the purported statement would aid his defense to the felony murder charge.[7] Nor for that matter did he show that Bornholdt would in fact testify. Finally, the motion was untimely in that it was not made until the eve of trial although the facts on which it was based were known to defense counsel months earlier.

Defendant next contends that the court unduly restricted his cross-examination of a key witness respecting the use of prior statements made by the witness to the police and an Assistant District Attorney. Specifically, counsel sought to use the statements to impeach Francisco Garcia's trial testimony that the defendant, Victory, kneed Patrolman Varecha in the groin. In the two prior statements, Garcia omitted any reference to having seen Victory knee the officer.[8] The court refused

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[7] We note that the People did not have to connect Victory with the shooting, other than to prove that it occurred in the course of and in furtherance of the felony of escape in the second degree.

[8] The significance of this testimony is that Victory could not be found guilty of felony murder unless he had been arrested for a felony and then escaped or attempted to escape during the course of which the killing occurred. The kneeing incident (assault, second degree, Penal Law, § 120.05[3]) was the predicate for the felony arrest and all that followed.

counsel's request to introduce the full statements into evidence and sustained objections to certain questions designed to show that the statements contained no reference to the alleged kneeing.

While it is well established that a witness' prior inconsistent statements may be used to impeach his trial testimony (e.g., *People* v. *Friedman*, 205 N. Y. 161, 167-168, *supra*), the test of inconsistency, we have said, is not limited to outright contradictions between a witness' prior statements and his trial testimony; it includes, as well, omitting to mention critical facts at the prior time, which facts are later related at trial (*People* v. *Rosario*, 9 N Y 2d 286, 289-290, quoting *Jencks* v. *United States*, 353 U. S. 657, 667.) The weight of authority holds, however, that a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time. It need also be shown that at the prior time the witness' attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial. (E.G., *Brooks* v. *E. J. Willig Truck Transportation Co.*, 40 Cal 2d 669, 255 P 2d 802, 806; *People* v. *Scott*, 218 Cal App 2d 249, 32 Cal. Rptr. 225, 229; *State* v. *Romprey*, 339 S W 2d 746, 751-752 [Mo. Sup. Ct.]; *Tanksley* v. *United States*, 145 F 2d 58, 60 [9th Cir.]; *Louisville & N. R. Co.* v. *Mitchell's Administratrix*, 276 Ky. 67, 124 S W 2d 1025, 1027; *Lamb* v. *Woodry*, 154 Or. 30, 58 P 2d 1257, 1260; *Ball* v. *State*, 43 Ariz. 556, 33 P 2d 601, 602; cf., *Steen* v. *Burleson*, 268 App. Div. 815; see also, 3A Wigmore, Evidence, § 1042 [Chabourne rev. 1970]; Underhill, Criminal Evidence, § 240 [5th ed., 1956].) The rule, we would say, accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description.

Applying this principle to the case before us, defendant failed to show that at the prior time Garcia's attention was specifically called to the manner in which Victory allegedly inflicted the blows upon Officer Varecha. Failing this, his trial testimony

could not be impeached by showing he omitted to mention the kneeing incident in the prior recorded statements.

We have considered defendant's other arguments for reversal and find them to be without substance.

PEOPLE V. BORNHOLDT

Defendant Bornholdt contends that a tranquilizing drug administered to him at Bellevue Hospital while awaiting trial rendered him incompetent to participate meaningfully in the jury selection proceedings, denying him due process of law. The record indicates, however, that although the defendant may have experienced uncomfortable moments, he was mentally aware of the proceedings, and was able to participate and converse with his attorney every day that the jury was being selected. Moreover, on no occasion did counsel request a continuance or adjournment on those days when he claimed his client was uncomfortable or unresponsive.

We have also considered the contention that the People failed to prove beyond reasonable doubt his sanity at the time of the crime. But although the psychiatric experts of the defense and prosecution gave contradictory views as to whether Bornholdt was suffering from paranoid schizophrenia at the time of the shooting, there was more than sufficient evidence from which a jury was privileged to conclude that defendant knew and appreciated the consequences of his conduct, and that such conduct was wrong.

The other points raised by the defendant have also been considered and found to be without merit.

In each case, the order of the Appellate Division should be affirmed.

* * * * * * * *

Orders affirmed. Opinion by Jasen, J. All concur.

APPENDIX B

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 7, 1971.

Present — Hon. Emilio Nunez, *Justice Presiding*
Theodore R. Kupferman
James B. M. McNally
George Tilzer
Samuel W. Eager, *Justices*

The People of the State of New York,

Respondent,

against

Albert Victory,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4514

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davidson, J.), rendered on May 26, 1970, convicting him of felony murder, and said appeal having been argued by Mr. Herald Price Fahringer of counsel for the appellant, and by Mr. Bennett L. Gershman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

HYMAN W. GAMSO
Clerk